

**REPORT - PLANNING COMMISSION MEETING  
February 24, 2005**

**Project Name and Number:** Bayside Business Park II (PLN2005-00085)

**Applicant:** King and Lyons

**Proposal:** An annual review of the Development Agreement

**Recommended Action:** Find the applicant in compliance with the provisions of Development Agreement DA-92-1

**Location:** The project is generally located on the west side of Interstate 880, north of Dixon Landing Road, south of the current Fremont Boulevard terminus.

**Assessor Parcel Number(s):** 519-0820-002-14, 519-0820-002-18

**Area:** 159 Acres

**Owner:** Irving Lyons

**Agent of Applicant:** John Hanson, King and Lyons

**Consultant(s):** None

**Environmental Review:** This review of this Development Agreement is exempt under Article 5, Section 15061(c)(3) of the California Environmental Quality Act (CEQA) in that the activity is not defined as a "project" under the adopted guidelines.

**Existing General Plan:** Restricted Industrial

**Existing Zoning:** I-R, Restricted Industrial

**Existing Land Use:** Vacant (grading in progress)

**Public Hearing Notice:** Public hearing notification is applicable. A total of nineteen notices were mailed to owners and occupants of property within 300 feet of the site on the following streets: Fremont Boulevard, Lakeview Boulevard, and Kato Road. The notices to owners and occupants were mailed on February 11, 2005. A Public Hearing Notice was delivered to The Argus on February 7, 2005, to be published by February 10, 2005.

**Executive Summary:** The Development Agreement approved by the City in 1994, requires an annual report from the City Manager on whether or not King and Lyons is in compliance with the requirements and obligations of the agreement. No actions related to the Development Agreement were required since the last annual review. It is recommended that the Planning Commission find King and Lyons to be in compliance with the provisions of Development Agreement DA 92-1.

**Background:** An Environmental Impact Report (EIR-89-56), rezoning (Z-89-8), a vesting tentative tract map (Tract 6591), a preliminary grading plan (GP-92-11), and a development agreement (DA-92-1) were approved by the City Council on March 1, 1994 for the 159-acre project site for the future development of industrial buildings on nine lots, south of the Fremont Boulevard terminus. The approved project designated 90 acres adjacent to Coyote Creek and the existing Wildlife Refuge as wetlands, and included a mitigation plan that would restore the lower wetlands area while providing some raised areas for protection of the salt marsh harvest mouse habitat. The remaining 59 acres of upland area was approved for nine developable lots (adjacent to Interstate 880), and a right-of-way and the extension of Fremont Boulevard to Dixon Landing Road. On August 10, 2000, the Planning Commission approved a revised Preliminary

Grading Plan (PGP) for the project. The revised PGP was necessary as a result of recommendations and permit approvals from the U.S. Fish & Wildlife Service and Army Corps of Engineers to achieve no net loss of wetlands on the project site. On October 24, 2000, the City Council denied a third party appeal of the Planning Commission's approval of the preliminary grading plan. In July 2001, King and Lyons received approvals from the public agencies for the wetland design.

In August 2001, August 2002 and December 2003, the Planning Commission found King and Lyons to be in compliance with the provisions of Development Agreement DA-92-1.

#### **Development Agreement:**

The Development Agreement cites as rationale for entering into the agreement:

- Need for construction of a levee along the westerly perimeter of the development portion of the property and Interstate 880, just easterly of the project site [to protect an endangered species on site (salt marsh harvest mouse)];
- City interest in mitigating the impacts on wetlands in advance of development;
- Potential for public cost savings in construction of Interstate 880/Dixon Landing Road interchange if development of the site commences before construction of the interchange;
- Early construction of the project will provide a second access to I-880 for the southern industrial area, westerly of I-880;
- Providing an alternative parallel route for I-880 to State Route 237 when McCarthy Boulevard is extended south by the City of Milpitas;
- Potential for purchase of Lot 1 at the northeasterly corner of the project site for use as an off-site mitigation area for wetland impacts at Dixon Landing interchange;
- Economic benefits of increased employment near the freeway interchange.

Obligations to provide the above benefits were primarily implemented in the conditions of the Vesting Tentative Tract Map and other approvals, not the development agreement. The only developer obligation set forth in the Development Agreement was to agree that the development of the property will be in conformance with the Existing Approvals (i.e., the General Plan, Zoning, EIR, Vesting Tentative Tract Map and Preliminary Grading Plan). The City's obligation was to agree to accept, process and review in good faith and in a timely manner all applications related to future approval and to cooperate with the developer in its efforts to obtain permits from other public agencies (Article 3 of the Development Agreement). The applicant has submitted a letter briefly describing the major benefits related to the development agreement and states that they are in compliance with the provisions of the Development Agreement. The applicant's wetland biologist report on the construction of the wetlands to date is included in the Planning Commission's packet for informational purposes only.

**Analysis:** The following section briefly reviews the relevant obligations contained in the project approvals.

**Construction of Levee:** To protect the development and Interstate 880, Vesting Tentative Tract 6591 included a berm with a top elevation of 12 feet above mean sea level, along the westerly side of Fremont Boulevard (along side a 50 foot wide moat intended to protect endangered species from predators). Condition 18 of the vesting map required the developer to post bonds for the construction of the berm and to complete the berm prior to the issuance of occupancy for any buildings within the project. The revised preliminary grading plan approved by the Planning Commission and upheld by the City Council in October 2000 eliminated this berm (and the moat).

To protect the project and Fremont Boulevard from a 100-year flood, the developers have proposed a revised grading plan that will raise the elevation of building pads and the extension of Fremont Boulevard to between 10-12 feet. According to the grading plan, which is also before the Planning Commission on February 24, 2005, the development's storm drain system will direct storm runoff from the development area into the marsh area and then to Coyote Creek through the proposed pond at the westerly perimeter of the site.

**Staff Comment:** At the time of Development Agreement approval, a levee or berm was proposed along the westerly border of the project. During the refinement of the wetland mitigation plan, an alternative solution for protecting the wetlands, development and freeway was developed and approved by the City. While the developer is obligated to incorporate the current solution into the project, the development agreement contains no specific deadline to fulfill this

obligation, nor does the development agreement prohibit the developer from seeking a modification. Therefore, the Developer is in compliance with these provisions of the Development Agreement.

**Wetlands Construction:** Much of the time between the original approval of the project in 1994 and the subsequent August 2000 grading plan revision was spent working with resource agencies, most notably, United States Fish and Wildlife Service, on the details of the wetlands to be created. According to the August 11, 2000 staff report on the preliminary grading plan, there will be about 85 acres of wetland restoration and enhancement. The work includes a new tidal pond and marsh in the western end of the site and improvements to the existing wetlands to improve winter drainage through the tidal ponds and constructed channels and tidal irrigation during the summer and fall. The intent of the design is to promote salt marsh growth.

The project construction, including the wetland restoration, is divided into three phases:

1. Phase 1, now virtually complete, consists of wetland restoration and enhancement work and the excavation and fill needed to rough grade the first five lots.
2. Phase 2 includes the rough grading for the remaining four lots, a box culvert across Scott Creek, and certain wetland and drainage improvements. Work on Phase 2 will not occur until specific performance standards are met in the restored and enhanced marshes of Phase 1.
3. Phase 3 involves construction of the final wetland design and construction of Fremont Boulevard and that portion of Dixon Landing Road not constructed in connection with the Dixon Landing interchange. See the enclosed staff report to the Planning Commission dated August 10, 2000 for more details.

**Staff Comment:** While no specific obligation for wetland restoration is contained in the Development Agreement, the developer's representative reports that the Phase 1 wetland construction is substantially complete. The developer has also provided the Corps of Engineers and the City a baseline report which describes the project site's pre-construction condition and refined performance standards as required by the Corps fill permit. Staff conducted a field trip, reviewed the required documentation and discussed the progress with the biological consultant. The Developer is in compliance with these provisions of the Development Agreement.

**Fremont Boulevard Construction:** Vesting Tentative Tract Map 6591 requires the dedication of right of way and all improvements of Fremont Boulevard from its existing terminus to Dixon Landing Road and McCarthy Boulevard in Milpitas. The revised Preliminary Grading Plan approved by the Commission required the developer to submit improvement plans for Fremont Boulevard prior to commencement of grading for phase 2. Construction of Fremont Boulevard extension is planned to be completed in Phase 3. Phase 3 is expected to begin within two to three years.

**Staff Comment:** Work is progressing on the improvement plans and rough grading of Fremont Boulevard. The developer is in compliance with these provisions of the Development Agreement.

**Lot 1 as Wetland Replacement:** As part of the Development Agreement, the applicant agreed to make Lot 1 available for purchase for possible use as a wetland, replacing wetlands impacted by the construction of the Dixon Landing Road interchange. Condition 10 of the Vesting Tentative Tract Map 6591 prohibits construction on Lot 1 until December 31, 1998 to allow it to be purchased for wetland mitigation for the Dixon landing interchange. Other land was purchased for mitigation of the interchange wetland destruction and the obligation to withhold construction on the parcel has expired.

**Staff Comment:** The developer has fulfilled the obligation to make available Lot 1 for use as a wetland mitigation area. The applicant is in compliance with these provisions of the Development Agreement.

**Parallel Route:** Construction of the Interstate 880-Dixon Landing interchange has been virtually completed, except for some landscaping. McCarthy Boulevard is extended from Dixon Landing Road to Route 237 in San Jose. With the construction of Fremont Boulevard across the subject property, a parallel route along Interstate 880 will exist. Completion of Fremont Boulevard could be complete within four to five years, if the development phasing proceeds as planned.

*Staff Comment:* Project approvals require the developer to construct Fremont Boulevard to Dixon Landing Road and McCarthy Boulevard. No obligations for Fremont Boulevard extension were required during this review period. The developer is in compliance with these provisions of the Development Agreement.

**Environmental Analysis:** EIR-89-56, consisting of a Draft and Final Environmental Impact Report was approved for the proposed project as originally submitted. The project has since been modified to further mitigate impacts to wetland resources to the satisfaction of the jurisdictional permitting agencies, including U.S. Fish & Wildlife Service and U.S. Army Corps of Engineers. An addendum to the EIR approved by the Planning Commission on August 11, 2000 for these modifications.

This review of this Development Agreement is exempt under Article 5, Section 15061(c)(3) of the California Environmental Quality Act (CEQA) in that the activity is not defined as a "project" under the adopted guidelines.

**Mitigation Monitoring/Reporting Plan:** The tentative map for the project required the approval of a mitigation monitoring /reporting plan prior to the first final map. The Assistant City Manager approved a mitigation monitoring/reporting plan on June 26, 2002. Prior to the approval of the plan, the City reviewed wetland restoration activities on the property for compliance with the mitigation measures incorporated into the tentative tract map and grading plan. The 2004 annual wetland report monitoring the progress, prepared by Zenter and Zenter, states the mitigation area is performing well. Three of the five performance standards have been met, and the fourth is close to being met. The December 4, 2004 Zenter and Zenter report is included as an enclosure. The project is in compliance with those mitigation measures.

**Conclusion:** As contained in Section 5.6 [Amendment of the Existing Approvals] of the 1994 Development Agreement, the City may grant certain amendments and modifications to the existing approvals. The project that involves minor revisions to the grading plan requested under a companion item (PLN2004-00322), which is also before the Planning Commission on February 24, 2005, is necessary to allow the retention of additional stockpiled soil used for the surcharging of Lots 1 through 5. Staff finds that the revisions to the grading plan are considered "modifications to the existing approvals", as permitted thereto. Therefore, staff believes King and Lyons is in compliance with the provisions of the Development Agreement for the 2003-2004 review period.

Under the provisions of the Fremont Municipal Code, if the Planning Commission finds the developer to be in compliance, the review is completed. If the Planning Commission finds and determines on the basis of substantial evidence that the property owner has not complied in good faith with the terms and conditions of the agreement during the period of review, the Planning Commission must forward its recommendation to the City Council. The City Council may modify or terminate the agreement.

**Response from Agencies and Organizations:** Any correspondence received has been forwarded to the Planning Commission.

**Enclosures:**

Informational 1	Compliance Evaluation and Chronology for Wetlands construction from John Hanson dated January 10, 2005.
Informational 2	Mitigation Check List of January 2005
Informational 3	December 2004 Zenter and Zenter Monitoring Report
Informational 4	August 10, 2000 Planning Commission Staff Report

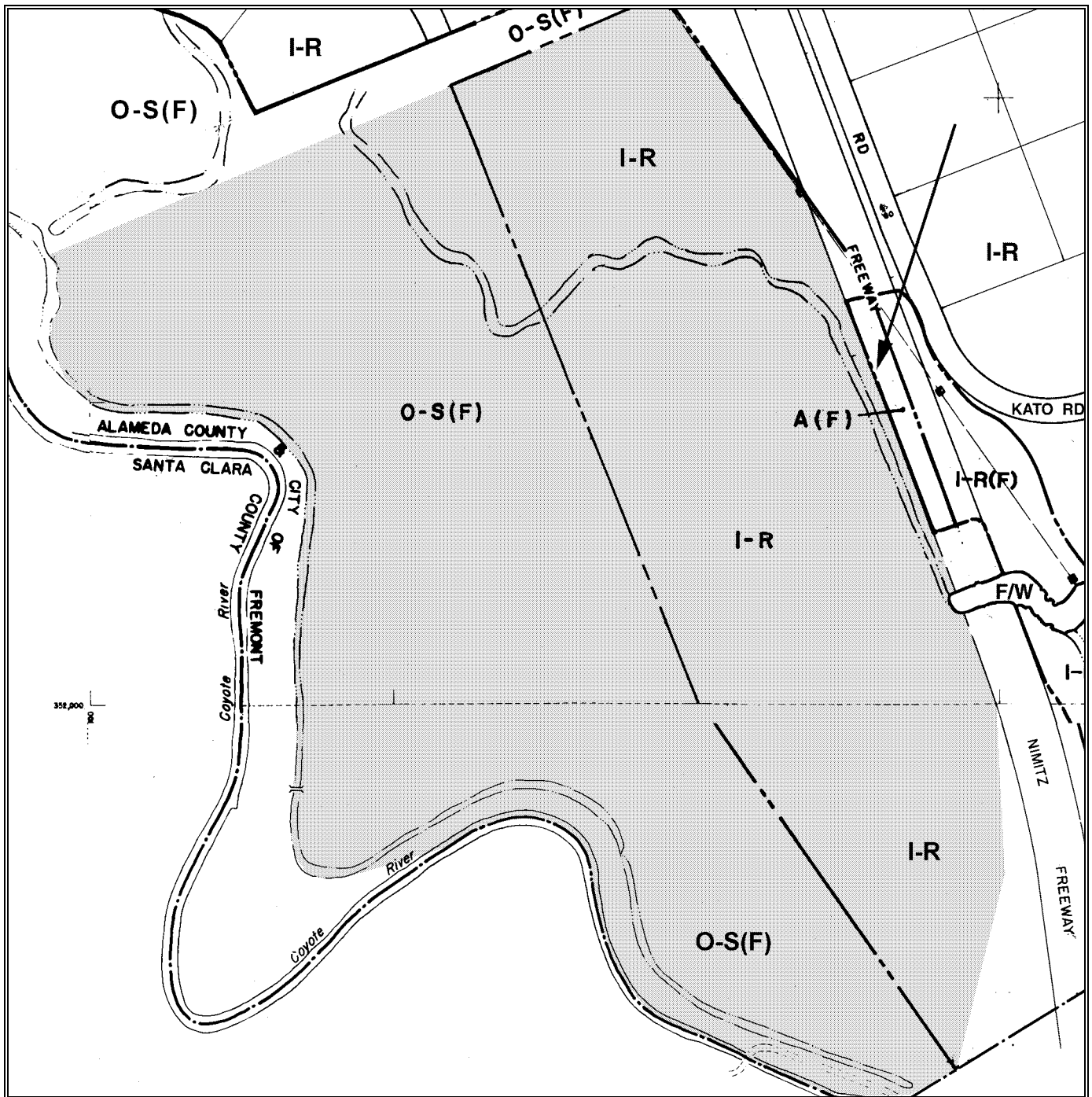
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**Recommended Actions:**

1. Hold public hearing.
2. Find the review of this Development Agreement is exempt under Article 5, Section 15061(c)(3) of the California Environmental Quality Act (CEQA) in that the activity is not defined as a “project” under the adopted guidelines.
3. Find on the basis of substantial evidence that the property owner has complied in good faith with the terms and conditions of the development agreement for the period under review.

Existing Zoning  
Shaded Area represents the Project Site



Existing General Plan

